

Reconceptualizing Criminal Fault in Abortion Cases: Reforming Indonesian Criminal Law

Muhamad Hafidz Riza¹

Universitas Muhammadiyah Gresik, Indonesia
muhamad.hafidz210901018@umg.ac.id

Ifahda Pratama Hapsari

Universitas Muhammadiyah Gresik, Indonesia
ifa.zegeeg@gmail.com

Submission	Accepted	Published
June 14, 2025	June 30, 2025	July 1, 2025

Abstract

Ideally, the element of criminal fault (mens rea) in abortion cases should be understood contextually by taking into account the psychological, social, and situational conditions of the perpetrator, particularly in cases involving victims of sexual violence. In reality, however, Indonesia's criminal law approach remains largely rigid and formalistic, offering limited space for a humanistic interpretation of criminal fault. This study aims to propose a new conceptual framework for reconceptualizing criminal fault in abortion-related offenses, based on the dynamics of Indonesia's ongoing criminal law reform. Employing a normative-juridical method with a descriptive-qualitative approach, this research is based on a literature review of the 2023 Criminal Code (KUHP), the Health Law, implementing regulations, and recent legal literature. The findings suggest that reconceptualizing criminal fault in abortion cases requires a broader understanding of the spectrum of culpability, rather than a simple binary of intent or negligence. While the 2023 Criminal Code represents progress by expanding protections for abortion victims under certain conditions, further improvements are needed in regulatory harmonization, evidentiary standards, and legal safeguards for medical personnel, to ensure a fair and victim-responsive application of the law.

Keywords: Reconceptualization, Legal Reform, Abortion

¹ Corresponding Author

Abstrak

Idealnya, unsur kesalahan (*mens rea*) dalam tindak pidana aborsi harus dipahami secara kontekstual dengan mempertimbangkan kondisi psikologis, sosial, dan situasional pelaku, khususnya dalam kasus yang melibatkan korban kekerasan seksual. Namun realitasnya, pendekatan hukum pidana di Indonesia masih cenderung rigid dan formalistik, dengan sedikit ruang bagi pemaknaan unsur kesalahan secara manusiawi. Tujuan dari penelitian ini adalah untuk menawarkan pemikiran baru dalam merekonseptualisasi unsur kesalahan dalam kejahatan aborsi dengan merujuk pada dinamika pembaharuan hukum pidana nasional. Penelitian ini menggunakan metode yuridis-normatif dengan pendekatan deskriptif-kualitatif melalui studi kepustakaan terhadap KUHP 2023, Undang-Undang Kesehatan, serta regulasi turunan dan literatur hukum terkini. Hasil penelitian menyimpulkan bahwa rekonseptualisasi unsur kesalahan dalam tindak pidana aborsi perlu diarahkan pada pemahaman spektrum kesalahan, bukan dikotomi antara sengaja atau tidak semata. Pembaharuan hukum pidana Indonesia melalui KUHP 2023 telah membuka ruang lebih luas untuk perlindungan korban aborsi dalam situasi tertentu, namun masih diperlukan penyempurnaan dalam hal sinkronisasi antar regulasi, pembuktian, serta perlindungan terhadap tenaga medis agar hukum berjalan adil dan responsif terhadap korban.

Kata Kunci: Rekonseptualisasi, Pembaharuan Hukum, Aborsi

Introduction

Social phenomena among adolescents and the younger generation today show an increasing intensity of liberal relationships, which have led to a range of emerging societal problems. One evident impact of such freedom in social interaction is the rise in out-of-wedlock pregnancies, prompting some women to undergo abortion as an instant solution to personal crises. Abortion, or the termination of pregnancy, is a complex issue that encompasses not only medical and social dimensions but also profoundly engages criminal law. Within society, abortion is often perceived as a moral and legal violation, especially when performed intentionally. However, abortion cases present diverse backgrounds that cannot be treated uniformly, such as incidents involving sexual violence, economic coercion, or social pressure.

Under the Indonesian legal system, abortion is categorized as a criminal act if performed intentionally and outside the exceptions stipulated by law. In the previous Criminal Code, abortion was rigidly treated as a criminal offense, with little regard for the perpetrator's motives or accompanying sociological and psychological contexts (Pandamdari et al., 2022). However, the reform of criminal law through Law No. 1 of 2023 concerning the Criminal Code reflects a paradigm shift by introducing exceptions to criminal liability for rape victims and in cases of medical emergencies, as outlined in Article 463(2). Nonetheless, the implementation of these provisions remains contentious due to procedural

complexities and administrative requirements that are difficult to fulfill, particularly for vulnerable victims.

Ideally, criminal law should serve not only to punish but also to guarantee substantive justice. In this context, reconstructing the concept of criminal fault or *mens rea* is crucial. The law should recognize coercion, trauma, and the lack of free will experienced by women—especially victims of sexual violence—when deciding to undergo abortion. By adopting a victim-oriented justice approach, the law should distinguish between abortion as a criminal act and abortion as an act to preserve the dignity and mental health of the victim (Lesmono & Fitriati, 2024). This concept is vital to ensure that the law does not operate indiscriminately but rather provides protection to those who should be regarded as subjects of legal safeguard rather than objects of criminalization.

In practice, however, the interpretation of criminal fault remains binary—either intentional or unintentional—without accounting for the complex nuances underlying a woman's decision to abort. Additionally, the dualism between the Criminal Code and the Health Law generates normative confusion in determining who should be held legally accountable. For instance, medical professionals assisting rape victims with lawful abortions may still fear prosecution due to unclear legal protection. Government Regulation No. 28 of 2024, ironically, still requires spousal consent in certain cases, thereby hindering access to safe and legal abortion for women experiencing domestic violence (Marunung et al., 2024). This legal ambiguity forms the root problem in reconstructing the notion of criminal fault in abortion offenses in Indonesia.

In response to these issues, this study aims to critically analyze how the element of criminal fault in abortion cases can be reconstructed from the perspective of Indonesia's criminal law reform. This research will examine the newly enacted provisions in the 2023 Criminal Code and its derivative regulations—particularly Articles 463 to 465—along with the Health Law No. 17 of 2023 and Government Regulation No. 28 of 2024, to assess how the legal system can become more adaptive and just in understanding abortion carried out under non-ideal circumstances, especially by victims of sexual violence. The contribution of this study is expected to enrich the discourse on criminal law reform by promoting a more contextual and humane legal approach. It advocates for a redefinition of criminal fault that goes beyond the perpetrator's intention, incorporating the social, psychological, and structural realities that influence such decisions. Moreover, this research may serve as a reference for policymakers in drafting victim-oriented legal norms and for legal practitioners in pursuing substantive justice amid the complexity of abortion cases in Indonesia.

Literature Review

Studies related to the reconceptualization of criminal fault in abortion cases are not entirely new. Several researchers have previously discussed and published works on this issue through various approaches—juridical, sociological, and ethical. Fional Bloomer, in her work titled *“Abortion: Ethical and Legal Perspectives in Indonesia”*, examines abortion as a complex and controversial issue in Indonesia. Her study emphasizes that societal acceptance of abortion largely depends on

cultural and religious backgrounds. Additionally, the differing views among major religions—Islam, Christianity, Hinduism, and Buddhism—regarding the legality and morality of abortion further complicate the public discourse surrounding this issue. Bloomer also highlights the importance of a human rights perspective, especially women's reproductive rights, in the abortion debate (Bloomer et al., 2018). Her study aligns with the present research in addressing the conflict between socio-cultural norms and state abortion policies. However, the distinction lies in this study's specific focus on criminal fault within criminal law and its reform within Indonesia's regulatory framework.

Next, Dinda Fefty Miranda Putri, in her study titled *"The Reformulation of Abortion Regulations: Study of the Ratio Legis and Ius Constituendum"*, explores the reformulation of abortion regulations in Indonesia from the philosophical basis and legislative intent. Putri emphasizes that legalizing abortion in emergency situations—such as cases of sexual violence—is a legal recognition of coercive circumstances (*force majeure*). In this context, rape is understood as a sexual violation that eliminates consent, placing the victim in a blameless position when choosing abortion (Putri et al., 2022). Her study intersects with the present research in exploring the legality of abortion resulting from rape. However, the key difference lies in the scope of analysis; this study elaborates on criminal fault from the perspective of the newly reformed Indonesian Penal Code and the interplay between related regulations, rather than focusing solely on *ratio legis*.

Nuri Yani, in her study titled *"Perlindungan Hukum Pelaku Tindak Pidana Aborsi Korban Pemerkosaan"*, specifically discusses the legal protection for women who undergo abortion as a result of rape. This research highlights the reality that victims of sexual violence are not only those outside family ties but also from close family circles, such as fathers or uncles. Such situations often push victims to seek unsafe abortions in secrecy, endangering their lives and health (Nuri Yani, 2024a). This study aligns with the current research in viewing abortion victims through the lens of legal protection. However, it differs in focus, as it does not examine criminal fault dogmatically within the structure of criminal offenses nor does it directly relate the issue to Indonesia's criminal law reform.

Based on the review of existing literature, it can be concluded that most previous studies tend to approach abortion from socio-cultural or general legal perspectives, as well as from the standpoint of victim protection in cases of sexual violence. Few have explicitly examined and reconceptualized the element of criminal fault (*mens rea*) in abortion offenses in light of Indonesia's criminal law reform, particularly following the enactment of Law No. 1 of 2023 on the Penal Code and its derivative regulations. Yet, analyzing this element is crucial, as it determines whether an individual can be held criminally liable. This research gap must be addressed, especially to respond to the need for a fair and context-sensitive legal approach to abortion cases involving sexual violence victims and other coercive conditions.

Research Methodology

The research methodology employed in this article falls under the category of library research with a qualitative approach. Library research is utilized to explore and analyze secondary data related to the theme of reconstructing the element of criminal fault (*mens rea*) in abortion offenses, particularly in the context of Indonesian criminal law reform. The qualitative approach is intended to explore the meaning, values, and substance of legal norms by describing legal phenomena in depth. This study adopts a normative-juridical character, focusing on the analysis of existing legislation and legal doctrines to examine the new provisions in the 2023 Criminal Code (KUHP) and its derivative regulations such as Government Regulations and the Health Law.

The methodology applied is document study, involving the analysis of primary legal sources such as statutory regulations—including the 2023 Indonesian Criminal Code, Law No. 17 of 2023 on Health, Government Regulation No. 28 of 2024—and other official documents directly related to the research topic. Secondary sources, including legal textbooks, scholarly journals, prior research, and relevant academic articles published within the last ten years, are also used as analytical material. In processing and analyzing the data, the researcher systematically interprets legal texts, classifies related legal issues, and cross-verifies expert opinions to obtain a comprehensive understanding. This process is conducted using a descriptive-analytical approach to formulate accurate conclusions aligned with the framework of current criminal law reform in Indonesia.

Criminal Offense of Abortion in Indonesian Law

The criminal act of abortion in Indonesia is classified into two main categories: *abortus provocatus medicalis*, which refers to the deliberate termination of pregnancy for medical reasons, and *abortus provocatus criminalis*, which refers to the intentional termination of pregnancy carried out illegally. In the development of Indonesian regulations, Law No. 17 of 2023 on Health provides exceptions to the prohibition of abortion, specifically in cases of medical emergencies and pregnancies resulting from rape that cause psychological trauma to the victim. Article 60 paragraph (1) of the Health Law essentially prohibits abortion, but grants exceptions in situations outlined in Law No. 1 of 2023 on the Indonesian Criminal Code.

The typology of abortion crimes can be classified into several points, each with distinct characteristics and regulations. From the perspective of Indonesia's positive criminal law—particularly under Law No. 1 of 2023 on the Criminal Code—the legislation provides a structured understanding of how Indonesian law views and regulates different forms of abortion. Based on legality and intent, abortion can be divided into two categories: *Abortus Provocatus Therapeuticus*, which refers to medically indicated abortions carried out due to health and safety considerations for the mother or fetus, following a medical recommendation (Ch. Lopulalan, 2021); and *Abortus Provocatus Criminalis*, which refers to the forced termination of pregnancy without any medical indication or clear legal basis (Marfuatun, 2018).

In terms of enforcement, Indonesia regulates abortion under Law No. 1 of 2023 on the Criminal Code. The law outlines various classifications of offenders and the matter of consent. First, *Self-Induced Abortion* is addressed in Article 463 paragraph (1), which states that a pregnant woman who intentionally terminates her own pregnancy or instructs someone else to do so may be punished with up to four years of imprisonment. This emphasizes the active role of the woman in the termination as the basis for criminal liability (Law No. 1 of 2023 on the Criminal Code, 2023). Second, *Abortion by Another Person Without Consent* refers to a pregnancy being terminated by another party without the pregnant woman's consent. In this context, the woman becomes the victim of an unauthorized abortion performed against her will (Anisah et al., 2024).

Third, *Abortion by Another Person With Consent* refers to an abortion performed by another party with the pregnant woman's consent. Even with consent, the act remains a criminal offense as it concerns legal protection of the fetus (Saada, 2020). Lastly, *Abortion by Medical Personnel or Persons with Special Expertise* refers to abortion performed by healthcare professionals or individuals with medical expertise. Regardless of whether it is done with or without the pregnant woman's consent, such acts are still categorized as criminal offenses. However, medical personnel may face heavier penalties compared to non-professionals. This category is addressed in Article 456 of the Criminal Code (Notonagoro & Sulistiyanta, 2023). To gain a deeper understanding of how Indonesian law constructs the offense of abortion, it is essential to identify the constituent elements of the crime. In general, these consist of objective elements and subjective elements.

Elements of the Criminal Offense of Abortion		
No	Objective Element	Subjective Element
1	Act of Terminating a Pregnancy	Intent (Dolus)
2	Act of Causing Fetal Death	Motive and Purposes
3	Administering or Ordering Medical Treatment	
4	With or Without the Pregnant Woman's Consent	

Table 01, Elements of the Criminal Act of Abortion (Liana et al., 2024)

The objective elements related to acts committed in the criminal offense of abortion consist of several components, including: "The Act of Terminating a Pregnancy," which refers to the removal of the fetus from the womb prematurely and unnaturally. This act becomes a criminal offense if it can be proven that the fetus was still alive in the womb. The next element is "The Act of Killing the Fetus,"

which refers to any action that causes the fetus's death in the womb, followed by its expulsion from the uterus. "Administering or Ordering Medical Treatment" also constitutes an objective element of the crime of abortion. This includes the act of providing treatment or instructing a pregnant woman to undergo treatment with the knowledge or intent that such treatment could result in the termination of her pregnancy. The next element is "With or Without the Pregnant Woman's Consent."

This element serves as a differentiating factor in classifying the criminal offense of abortion and affects the severity of the imposed penalty. Abortions performed without the pregnant woman's consent carry harsher penalties than those conducted with her consent. The subjective elements relate to the perpetrator's mental or psychological condition and are divided into two components: Intent (*Dolus*) and Motive and Purpose. Intent refers to the perpetrator's willful intention to commit an act of abortion. This intent may be directed toward terminating the pregnancy, killing the fetus, instructing others to terminate the pregnancy, or instructing others to kill the fetus. Intent is a crucial element that must be proven in legal proceedings related to abortion crimes. Furthermore, motive and purpose, although not explicitly formulated as elements of the offense, are often considered in the law enforcement process. Motives may vary, ranging from the desire to eliminate the result of an extramarital sexual relationship to economic or social reasons.

Reconceptualizing Criminal Fault in Abortion Offenses

The assessment of criminal fault or *mens rea* in abortion offenses in Indonesia remains a contested issue that highlights the tension between legal idealism and sociological reality. Normatively, Indonesian positive criminal law stipulates that subjective elements such as intent are essential prerequisites for establishing criminal liability. This is outlined in Articles 463–465 of Law No. 1 of 2023 concerning the Criminal Code and Article 60 of Law No. 17 of 2023 on Health. These provisions require clear and deliberate intent by the perpetrator to qualify an act as a criminal abortion offense. However, in practice, this legal approach tends to be rigid and fails to account for the diversity of motives, social pressures, and psychological conditions that often underlie such acts—especially in illegal abortions involving victims of sexual violence. As a result, law enforcement focuses more on formalistic legal certainty rather than ensuring substantive justice that is more humane toward individuals in complex circumstances.

This condition emphasizes the need to reconceptualize the element of fault in abortion offenses, particularly through an approach that considers the social and psychological background of the perpetrator. The current legal paradigm, which dichotomizes fault into either intentional or unintentional, is no longer adequate to address the complex realities faced by individuals who undergo abortions. In this context, a contextual criminal law approach should be considered as a new way to interpret real-life social conditions. The legal principle *lex specialis derogat legi generali* can be applied to give precedence to specific legal norms in health law or women's protection in particular contexts, rather than prioritizing the general norms of classical criminal law (Marunung et al., 2024). Thus, there needs to be a reinterpretation of *mens rea* that acknowledges a spectrum of intent

and levels of responsibility based on the social, economic, and psychological factors of the offender.

Empirical studies also indicate that one of the main challenges in proving intent in illegal abortion cases is the limitation of available evidence, both medically and psychologically. In many investigations, abortion victims are often reluctant to testify due to shame, fear of social stigma, or trauma from rape. Additionally, medical evidence such as *visum et repertum* is often unreliable because most abortions are carried out covertly using medications that are difficult to trace. Moreover, many remote areas in Indonesia lack access to forensic psychologists, making it difficult for victims to fulfill the administrative requirements mandated by Article 34 of Government Regulation No. 61 of 2014 on Reproductive Health (Frasiska et al., 2022). These barriers complicate the ability of law enforcement to prove *mens rea* concretely and ultimately place victims at risk of criminalization.

Meanwhile, the Health Law actually provides exceptions for abortion under certain circumstances, particularly for victims of sexual violence. This provision opens the door for applying restorative justice principles, such as halting prosecution against victims of illegal abortions when there is proof of rape, a forensic psychologist's recommendation, and gestational age of less than 12 weeks (Suwandono & Busyra, 2025). However, the implementation of these exceptions is fraught with difficulties. Reporting to law enforcement can take more than 14 days, causing victims to miss the legal window for a safe abortion. Furthermore, trauma victims may not realize their pregnancy early enough, let alone access a forensic psychologist and obtain an official investigator's statement within such a limited timeframe. As a result, regulations meant to protect victims often become new barriers to achieving justice.

This gap between legal provisions and victims' realities further reveals the need to reconsider the concept of fault in abortion cases. For instance, in cases of pregnancy resulting from rape, victims suffering from severe trauma often cannot process information or recognize their pregnancy promptly. Therefore, strict time limits—such as 12 weeks in the 2023 Health Law or 40 days in Government Regulation No. 61 of 2014—are highly unrealistic. These discrepancies cause women who should be protected by the law to instead become vulnerable to criminalization. In such contexts, fault cannot be interpreted in black-and-white terms but must be examined through a comprehensive socio-psychological framework (Laksono et al., 2024). This approach allows the law to become more responsive to women's lived experiences, rather than merely serving as a repressive tool.

The concept of the *spectrum of intent* in modern criminal law offers courts the flexibility to assess the degree of a perpetrator's fault based on the surrounding circumstances. In many abortion cases, the decision to terminate a pregnancy is not always the result of fully autonomous, free will. Economic hardship, family pressure, sexual violence, and psychological instability often play significant roles, which cannot be equated with acts of deliberate intent in the classical sense. Unfortunately, this nuanced approach has yet to be fully adopted by Indonesia's justice system, which still predominantly relies on colonial penal frameworks

(Marunung et al., 2024). This structural limitation hinders the realization of substantive and contextual legal justice.

A similar issue arises in cases involving doctors or medical personnel who perform illegal abortions. In several court decisions, judges often disregard economic motives or pressure from patients. In fact, in the context of progressive criminal law, motive is an important factor in assessing the degree of intent. Many doctors perform such procedures not out of malice, but out of concern for patient safety, lack of legal facilities, or pressure from the victim's family. However, rigid and decontextualized legal interpretations result in these acts being immediately classified as crimes without considering mitigating circumstances (Fitrah, 2020). Consequently, the legal system loses its sense of justice and instead becomes an instrument of oppression against those who deserve understanding.

This condition illustrates that Indonesia's criminal justice system—particularly on the issue of abortion—is still heavily influenced by colonial legal legacies that emphasize formal legal certainty. In contrast, in a modern democratic rule-of-law state, the law should function not only as an instrument of control but also as a means of protection and emancipation. Reforming the concept of fault is therefore an integral part of broader criminal law reform. Re-evaluating *mens rea* in abortion cases is crucial to ensure that victims are not criminalized, but rather recognized as subjects whose rights deserve full legal protection.

Thus, a paradigm shift in how criminal fault is interpreted in abortion offenses is a strategic step toward building a more just, inclusive, and socially responsive criminal legal system. Interpretation of *mens rea* must not remain fixed within static normative formulas but must evolve in line with the complexities of real-world events and societal dynamics. An approach that considers the *spectrum of intent*, the perpetrator's psychological and social background, and the limitations in accessing legal and health services provides a foundation for determining whether a particular act deserves punishment. Through this reformulation, the law can not only fulfill demands for legal certainty but also answer the call for a higher standard of justice in an ever-evolving society.

The Impact of Regulatory Dualism on Abortion in Indonesia's Legal System

The regulation of abortion in Indonesia reflects a complex legal landscape that remains inadequate in addressing social realities and public health needs, particularly those concerning women. Various laws have been issued to govern abortion procedures and limitations, both from criminal and health law perspectives. However, the existence of multiple regulations with differing scopes and often lacking coherence has led to legal dualism, causing widespread confusion. This situation not only harms the victims—who should be protected—but also places law enforcement officers and medical professionals in a difficult position when they must make decisions in emergency situations. As a result, this legal ambiguity creates uncertainty that ultimately hinders the full protection of women's reproductive health rights (Khairunnisa et al., 2024).

Normatively, abortion in Indonesia is regulated across several layers of legislation, including Law No. 17 of 2023 on Health, Government Regulation No. 28 of 2024, and Minister of Health Regulation No. 2 of 2025. Additionally, the criminal

aspect of abortion remains governed by Law No. 1 of 2023 on the Criminal Code (KUHP). However, this array of regulations lacks sufficient substantive harmonization. These laws include overlapping requirements and procedures that are not integrated, often leading to differing interpretations among law enforcement and policy implementers. As a consequence, women—especially rape victims or those in medical emergencies—are forced to navigate multiple burdensome procedures that hinder access to legal abortion services (Waruwu & Irawati, 2025).

Minister of Health Regulation No. 2 of 2025 specifically regulates technical procedures for abortion services within the framework of reproductive health. Nevertheless, it imposes unrealistic administrative burdens on women, such as requiring a statement from law enforcement, a physician's approval, counseling results, and a recommendation from a review team. All of these must be fulfilled before the abortion can proceed. Ironically, abortion services are only permitted at Advanced Referral Health Facilities (FKTL), which are geographically scarce and difficult to access, especially for women in remote areas. In this context, regulation itself becomes a structural barrier that leads to inequality in accessing what should be universal health services. The issue is further complicated by Articles 463 to 465 of Law No. 1 of 2023 on the Criminal Code, which prohibit abortion in any form and fail to mention exceptions. This directly contradicts Article 60 of Law No. 17 of 2023 on Health, which explicitly allows abortion under two conditions: in medical emergencies and in cases of pregnancy resulting from rape. Unfortunately, despite these exceptions in the Health Law, the conditions for accessing these rights remain burdensome, such as requiring a husband's consent and recommendations from a medical team. In practice, these requirements delay what should be swift decision-making processes, especially in high-risk cases that threaten maternal safety.

The conflict between the *lex generalis* in the Criminal Code and the *lex specialis* in the Health Law carries serious legal implications. Although legal theory dictates that *lex specialis* overrides *lex generalis*, law enforcement officials often rely on the Criminal Code when evaluating abortion cases—even those conducted legally under medical procedures. There have been instances where doctors or medical personnel following Health Law procedures were still criminalized under Criminal Code articles. This demonstrates the weak legal protection for reproductive health service providers due to the absence of clear and binding operational guidelines. This legal dualism also affects the healthcare sector. A recent study in East Java Province found that 72% of medical personnel expressed reluctance to perform abortion procedures, even when patients legally qualified under the Health Law, due to fear of prosecution under the Criminal Code (Kurniawan, 2024). This fear drives many doctors to refer patients to illegal clinics or to refuse care altogether, even in life-threatening medical situations. These concerns are valid, as there is no concrete state-backed guarantee that ensures legal safety for professionals acting in good faith.

Another major issue lies in Article 60(2)(c) of Law No. 17 of 2023 on Health, which requires spousal consent for legal abortion. This provision directly undermines the principle of bodily autonomy for women and reinforces patriarchal dominance in medical decision-making. In cases of domestic violence,

this becomes highly problematic, as female victims must obtain permission from their abuser to access abortion services. Such a condition clearly contradicts the principles of restorative justice and protection of gender-based violence victims (Muhammad Raffi & Eka Juarsa, 2023). For rape victims living in remote areas, administrative barriers pose a significant challenge in proving their status as victims. Requirements such as police certificates, forensic psychological evaluations, and medical examinations (*visum*) are difficult to obtain promptly. Police procedures alone can take over two weeks, while legal abortion is only allowed within the first 12 weeks of pregnancy.

This reality shows that sexual violence victims are losing their opportunity to access safe and legal abortion services because the state has failed to provide a responsive and adaptive system (Khairunnisa et al., 2024). The regulatory dualism also creates legal knowledge fragmentation at the enforcement level. Many law enforcement officials in regional areas still lack comprehensive understanding of the exceptions provided in the Health Law. As a result, in many cases, investigators continue to use the Criminal Code as the sole reference in evaluating the legality of abortion. Yet, with a progressive legal approach, the Health Law offers a more relevant framework for protecting the rights to health and maternal safety. This lack of harmonization opens procedural loopholes that harm both women and medical personnel. The fragmentation of the legal system has a dangerous domino effect. Besides obstructing access to reproductive health services, legal dualism also increases the risk of unsafe abortion practices conducted illegally. Women unable to fulfill the administrative requirements or access official services are likely to turn to high-risk alternatives that jeopardize their health and even lives. In many instances, unsafe abortions are carried out in unlicensed locations with substandard equipment and medications, and without oversight from qualified medical professionals.

Handling Abortion Crimes in the Context of Criminal Law Reform in Indonesia

The reform of Indonesia's criminal law through the enactment of Law No. 1 of 2023 concerning the new Criminal Code (KUHP) marks a pivotal chapter in the transformation of the national criminal justice system. One significant issue receiving attention in this reform is the regulation of abortion, which had previously been addressed in a conservative manner, often neglecting the social and psychological conditions of the perpetrators—especially victims of sexual violence. Under the colonial-era Criminal Code, abortion was only allowed in emergency medical situations where the mother's life was at risk. Traumatic experiences of women due to sexual violence were not accommodated in that legal framework. Today, with the arrival of the new Criminal Code, there is a shift toward a more contextual and humanistic approach that attempts to accommodate the realities of victims in a more holistic manner (Fajrin et al., 2023; Inayatul Anisah et al., 2024).

Article 463 paragraph (1) of the new Criminal Code states that any woman who undergoes an abortion may be sentenced to a maximum of four years in prison. However, progressively, paragraph (2) provides an exception to criminal

liability if the abortion was a result of pregnancy due to rape or other forms of sexual violence, provided that the gestational age does not exceed 14 weeks (Kusuma, 2024). This stipulation marks a paradigm shift in assessing criminal fault (*mens rea*), wherein the individual—if a victim of sexual violence—is not automatically considered a criminal offender but rather a victim entitled to legal protection. In this framework, the new Criminal Code attempts to strike a balance between justice and legal certainty while also considering complex moral dimensions.

The development of new norms in the Criminal Code regarding abortion is also reflected in the grouping of relevant provisions, particularly Articles 463 to 465, located in Chapter XXI. These articles regulate not only women who undergo abortions but also those who assist or encourage them to do so—whether with or without the woman’s consent. Performing an abortion without the woman’s consent carries a heavier penalty of up to 12 years in prison. Additionally, healthcare professionals involved in illegal abortions face additional sanctions of up to one-third more than the general punishment and the possible revocation of their medical licenses (Laksono et al., 2024b). Even so, these provisions still include exceptions to protect women undergoing abortions due to emergency or as victims of sexual crimes.

The contrast with the old Criminal Code is striking. The previous Code (Articles 346–349) offered no explicit legal protection for victims of sexual violence who had abortions. That legal approach was neutral toward the motives behind abortion, disregarding psychological trauma, social pressure, or coercive factors experienced by the victims. The new Criminal Code explicitly adopts principles that were previously introduced in the Health Law since 2009, especially those related to abortion exceptions in rape cases. In fact, the new Criminal Code extends the permissible gestational age from 12 weeks (as in the previous Health Law) to 14 weeks—an acknowledgment of the administrative and psychological obstacles victims often face when trying to access legal abortion services in time.

Nevertheless, implementing these new norms still faces significant challenges. The National Commission on Violence Against Women (Komnas Perempuan) has pointed out that victims of sexual violence often struggle to meet the administrative requirements for accessing legal abortion. Victims are typically required to obtain letters from doctors, investigators, and medical teams, which, in practice, are time-consuming and complex. In remote areas, limited access to forensic psychologists or adequate medical facilities further worsens the victim’s situation. Therefore, it is crucial for the government to simplify and disseminate procedures so that victim protection norms do not remain merely as legal text but can be effectively implemented in practice (Kaswandi & Musa, 2024).

In the context of criminal law reform, integrating the victim’s perspective is a key indicator of a successful legal transformation. The new Criminal Code reflects this awareness by prioritizing the victim’s condition in determining criminal liability. Previously, Article 75 of Law No. 36 of 2009 on Health allowed abortion for rape victims suffering psychological trauma, but this had not yet been legitimized within the old Criminal Code. Now, the new Criminal Code explicitly adopts that approach, demonstrating a synchronization of regulations between the

health and criminal law sectors. This indicates that the national legal system is transitioning from a repressive model to a more corrective and victim-centered approach (Nuri Yani, 2024b).

Government Regulation No. 28 of 2024, which implements Law No. 17 of 2023 on Health, also serves as a technical regulation supporting the new Criminal Code in the context of abortion. This regulation states that women who are victims of sexual violence or in emergency medical conditions may access safe abortion services without facing criminal charges, as long as the requirements of gestational age and medical administration are met. In this case, legal defense is not just a form of legal justification but also a recognition of the victim's condition as an exception to punishment. However, this necessitates cross-sectoral cooperation among healthcare providers, law enforcement officers, and legal advocates to prevent confusion in practical implementation.

The foundational principle used in the new Criminal Code regarding abortion offenses is limited decriminalization based on conditions. That means abortion remains a punishable offense in general but is not criminalized if performed by a victim of sexual violence or in medical emergencies. These exceptions are conditional and time-bound (limited to pregnancies under 14 weeks), allowing only restricted legal action under specific procedural requirements. Although this policy is progressive, it still presents challenges, particularly when victims are unable to meet the deadlines or administrative conditions due to trauma or geographical constraints. Furthermore, the penal approach based on non-penal principles for victims aligns with the spirit of Law No. 12 of 2022 on Sexual Violence Crimes (UU TPKS), which prioritizes victim recovery. The legal system here aims to shift toward restorative justice, where punishment is not the only way to resolve cases. In the context of abortion due to sexual violence, recovery-oriented approaches must take precedence—including access to healthcare services, psychological support, and social rehabilitation.

Although regulatory improvements have been made, Indonesia's criminal justice system still requires periodic evaluation in its implementation. The new Criminal Code, as a comprehensive and complex legal product, must be supported by improved capacity of law enforcement officers and medical personnel to understand the new norms, along with strengthened health infrastructure. Ongoing training, policy dissemination, and the development of standardized technical guidelines are essential to ensure that the victim protection spirit embedded in the Criminal Code provisions is not lost in implementation. With attention to social dynamics and victim realities, future criminal law reforms in Indonesia must continue moving toward more humane and participatory efforts. The new Criminal Code has taken a positive first step in handling abortion cases more justly. However, integrating the victim's perspective into the legal system is not an instant process—it requires sustained commitment from all sectors of the state and society.

Conclusion

The reconceptualization of the element of fault in addressing abortion-related crimes has become an urgent necessity within Indonesia's criminal justice system, considering the complex psychological, social, and situational factors that often underlie abortion acts. The element of fault (*mens rea*) can no longer be understood in a binary manner as simply intentional or unintentional. In abortion cases—especially those involving victims of sexual violence or medical emergencies—the element of fault must be analyzed through a more contextual and humanistic approach. This assessment requires consideration of the victim's condition, social pressures, and limited access to healthcare services. If these factors are ignored, the result could be injustice and a disregard for human values in the application of criminal law.

From the perspective of Indonesia's criminal law reform, the enactment of the 2023 Criminal Code (KUHP) along with supporting regulations such as the Health Law No. 17 of 2023 and Government Regulation No. 28 of 2024 demonstrates a progressive shift in the legal treatment of abortion. These reforms open space for a victim-oriented justice approach, granting exceptions from criminal liability for women who are victims of rape and for medical professionals acting in emergency conditions. However, the implementation of these reforms continues to face challenges, including overlapping regulations, administrative bureaucracy, and a judicial approach that remains largely conservative. Therefore, criminal law reform must continue to strengthen the principle of substantive justice by dynamically adjusting the concept of fault to align with social realities and victims' needs, in order to create a legal system that is more adaptive, just, and grounded in humanity.

References

- Anisah, I., Choiriyah, A. L. F., & Putra, T. D. (2024). Aborsi yang legal bagi korban pemerkosaan: Perlindungan hukum dan perdebatan HAM. *Al-Ahkam: Jurnal Hukum Pidana Islam*, 6(2), 148–162. <https://doi.org/10.47435/al-ahkam.v6i2.1377>
- Bloomer, F., Pierson, C., & Estrada Claudio, S. (2018). *Reimagining global abortion politics: A social justice perspective*. Policy Press. <https://doi.org/10.1332/policypress/9781447340430.001.0001>
- Ch. Lopulalan, J. J. (2021). Penerapan sanksi atas tindak pidana pengguguran kandungan (Abortus Provocatus) menurut KUHP dan Undang-Undang No.36 Tahun 2009 tentang Kesehatan. *Lex Privatum*, 9(3), 269–277. <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/33875>
- Fajrin, Y. A., Kurniawan, K. D., & Ishwara, A. S. S. (2023). The renewal of national criminal law: An analysis of the Pancasila law philosophy. *SASI*, 29(4), 645. <https://doi.org/10.47268/sasi.v29i4.1623>
- Fitrah, T. A. (2020). *Peran Visum et Repertum sebagai alat bukti pada pembuktian Abortus Provokatus Kriminalis* [Skripsi, Universitas Muhammadiyah Sumatera Utara].

- Frasiska, J., Suhariyanto, D., & Setiawan, P. A. H. (2022). Pembuktian hakim dalam tindak pidana perkosaan perempuan dengan kekerasan dan ancaman. *Setara*, 3(2), 1–19.
- Kaswandi, & Musa, S. M. (2024). Aborsi ditinjau dalam perspektif hukum kesehatan: Studi literatur. *IMJ: Indonesian Midwifery Journal*, 7(2), 1–7. <https://doi.org/10.31000/imj.v7i2.11377>
- Khairunnisa, M., Kefi, M. U., Makraja, F., & Nimah, R. (2024). Aborsi di persimpangan hukum dan agama: Perspektif politik hukum kesehatan dan Islam di Indonesia. *Usrotuna: Journal of Islamic Family Law*, 1(2), 179–211.
- Kurniawan, M. T. A. (2024). *Harmonisasi pengaturan aborsi dalam sistem perundang-undangan di Indonesia perspektif masalah mursalah* [Skripsi, Universitas Islam Negeri Maulana Malik Ibrahim].
- Kusuma, M. A. (2024). Pemberlakuan sanksi pidana terhadap pelaku aborsi di Indonesia: Studi komparatif Wetboek van Strafrecht (WvS) dan Undang-Undang No. 1 Tahun 2023 tentang KUHP. *Ilmu Hukum Prima (IHP)*, 7(2), 232–242. <https://doi.org/10.34012/jihp.v7i2.5576>
- Laksono, A., Rafi'e, M., & Chalil, M. (2024). Analisis hukum terhadap pelaku aborsi menurut hukum pidana yang berlaku di Indonesia. *Jurnal Kajian Hukum dan Kebijakan Publik*, 1(2), 79–84. <https://doi.org/10.62379/1xpyf969>
- Lesmono, J. H., & Fitriati. (2024). Penerapan unsur tindak pidana aborsi oleh penyidik berdasarkan alat bukti yang digunakan. *Unes Journal of Swara Justisia*, 8(1), 187–194. <https://doi.org/10.31933/ujsj.v8i1.495>
- Liana, F. E., Lestari, I. D., Zayyan, K. A., Ilma, T., & Astuti, W. (2024). Ketentuan aborsi untuk korban tindak pidana ditinjau dari UU No.1 Tahun 2023, antara legalitas dan moralitas. *Jurnal Lentera Ilmu*, 1(1), 53–63. <https://doi.org/10.59971/li.v1i1.23>
- Marfuatun, L. (2018). Aborsi dalam perspektif medis dan yuridis. *Jurnal Kebidanan dan Kesehatan Akbid Surya Mandiri Bima*, 5(2), 6–10.
- Marunung, N. P. V., Rakia, A. S. R. S., & Hidayat, A. W. (2024). Aborsi dalam kasus pemerkosaan anak: Perspektif Undang-Undang Nomor 17 Tahun 2023 dan Hak Asasi Manusia. *JULIA: Jurnal Litigasi Amsir*, 11(3), 403–416. <https://journalstih.amsir.ac.id/index.php/julia/article/view/576>
- Muhammad Raffi, & Juarsa, E. (2023). Tindak pidana aborsi ditinjau dari perspektif HAM dan hukum positif Indonesia. *Jurnal Riset Ilmu Hukum*, 43–48. <https://doi.org/10.29313/jrih.v3i1.2130>
- Notonagoro, M. A. A., & Sulistiyanta. (2023). Analisis penetapan unsur kesalahan pada rumah sakit dalam tindak pidana pada bidang kesehatan. *RECIDIVE: Jurnal Hukum Pidana dan Penanggulangan Kejahatan*, 12(1), 1–13. <https://doi.org/10.20961/recidive.v12i1.65032>
- Nuri Yani. (2024). Perlindungan hukum pelaku tindak pidana aborsi korban pemerkosaan. *Mandub: Jurnal Politik, Sosial, Hukum dan Humaniora*, 2(4), 93–107. <https://doi.org/10.59059/mandub.v2i4.1712>
- Pandamdari, E., Djajaputra, G., & Asror, E. M. (2022). Tinjauan yuridis pertanggungjawaban pelaku di Indonesia terkait tindak pidana aborsi. *Synotic Law: Jurnal Ilmu Hukum*, 1(1). <https://doi.org/10.56110/sl.v1i1.2>

- Putri, D. F. M., Azizah, A., & Tannuwijaya, F. (2022). The reformulation of abortion regulations: Study of the ratio legis and *ius constituendum*. *Rechtsidee*, 10(2). <https://doi.org/10.21070/jihr.v11i0.799>
- Saada, M. F. (2020). Tindakan aborsi yang dilakukan seseorang yang belum menikah menurut KUHP. *Lex Crimen*, 9(3), 46–54.
- Suwandono, A., & Busyra. (2025). Abortion: Ethical and legal perspectives in Indonesia. *Asian Bioethics Review*. <https://doi.org/10.1007/s41649-024-00322-4>
- Undang-Undang No. 17 Tahun 2023 tentang Kesehatan, Presiden Republik Indonesia (2023).
- Undang-Undang No. 23 Tahun 2004 tentang Penghapusan Kekerasan dalam Rumah Tangga, Presiden Republik Indonesia (2004).
- Undang-Undang Republik Indonesia No. 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana, Kemensesneg RI (2023).
- Waruwu, C., & Irawati, A. C. (2025). Analisis yuridis aborsi korban perkosaan dalam perspektif hukum pidana dan Undang-Undang Kesehatan. *PESHUM: Jurnal Pendidikan Sosial dan Humaniora*, 4(3). <https://doi.org/10.56799/peshum.v4i3.8370>